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RETHINKING INTERVENTION IN ENVIRONMENTAL LITIGATION

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Intervention in Public Law Litigation: The Environmental Paradigm (Environmental Paradigm) substantially enhances understanding of intervention in federal environmental disputes.¹ These controversies are a critical type of modern civil lawsuit and perhaps constitute the quintessential form of public law litigation. Professor Peter Appel comprehensively reviews the lengthy history of the intervention mechanism, scrutinizes the substantial 1966 revision of Federal Rule of Civil Procedure 24, and closely examines the phenomenon of public law litigation and intervention in it.

Professor Appel finds that federal district court judges liberally grant requests to intervene in these cases, although he asserts that some legal scholars have criticized trial judges for narrowly applying intervention in environmental cases and for underestimating the contributions that intervention applicants can make to resolution of these lawsuits.² Professor Appel's observations lead him to suggest that appellate and district courts rethink intervention in environmental litigation. Professor Appel urges that the courts of appeals, which now review district court intervention decisions de novo, instead use an abuse of discretion standard.³ Moreover, he suggests that district judges depart from trans-substantive application of Rule 24 and employ amicus curiae involvement as a substitute for intervention of right.⁴

Professor Appel, thus, significantly advances the dialogue about public law cases and intervention in them and much that he states is undisputed. Nevertheless, certain aspects of his article are controversial; therefore, *Environmental Paradigm* warrants a response. This piece undertakes that effort. I essentially afford a friendly critique, which emphasizes several important ways that Professor Appel and I differ and suggests how Professor Appel's helpful analysis might be elaborated. My thesis is that we need a better understanding of the history, theory, policy, and practice of environmental litigation and of intervention in it. Until our comprehension of

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1. Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L.Q. 215 (2000).

2. See *id.* at n.10. I am one of those scholars.

3. See *id.* at nn.438-41 and accompanying text.

4. See *id.* at nn. 449-60 and accompanying text.

these matters is more refined, it will remain difficult to articulate with confidence the best prescriptions for the issues raised by intervention.

I. EMPIRICAL DATA ON ENVIRONMENTAL LITIGATION AND INTERVENTION

First, and perhaps foremost, we need to improve understanding of modern environmental litigation and of the role of intervention in it. Judges, attorneys, and legal scholars participate in too much speculation premised on anecdotes and impressions as well as reliance on appellate and district court intervention decisionmaking in environmental cases which have appeared in federal reporters or are available online. For example, Professor Appel apparently assumes that intervention is granted too freely and that successful applicants consume more time than is warranted,⁵ while other federal court observers, including me, presume that intervention decisionmaking is overly restrictive and that those permitted to intervene will make substantial contributions.⁶ The truth probably lies somewhere in between.

Systematically collecting, analyzing, and synthesizing empirical data is critical when considering the institution of changes as fundamental as those suggested by Professor Appel.⁷ It is also important to realize that certain aspects of this analysis will defy precise empirical verification. At some juncture, the inquiry will devolve into value judgments and even speculation. For instance, it is exceedingly difficult to ascertain the value of the contributions that an applicant denied intervention might have made, particularly identifying cause-effect linkages between the input foregone and substantive judicial decisionmaking. Similar problems attend efforts to determine how much applicants granted intervention delay dispute resolution and improve judicial decisionmaking.⁸

Some of this information may be readily available because it already exists in the information systems of the Federal Judicial Center, the

5. See *id.* at text accompanying n.426.

6. See, e.g., Emma Coleman Jones, *Problems and Prospects of Participation in Affirmative Action Litigation: A Role for Intervenors*, 13 U.C. DAVIS L. REV. 221 (1980); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270 (1989); see also Appel, *supra* note 1, at n.10.

7. For articulation of this idea in a related context, see Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1930 (1989); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 455-59 (1993).

8. It is also important to recognize that delay attributable to helpful intervenor contributions should not be considered detrimental. For more discussion of these ideas, see Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415, 446-53.

Administrative Office of the United States Courts, or specific appellate or district courts. More, and ostensibly better, material probably exists in the case files of individual environmental lawsuits. It might be useful to assemble this material, especially the information collected from appellate or district courts. For example, evaluators could compare appeals in circuits which apply the *de novo* and the abuse of discretion standards. Assessors might also consult cases in districts with diverse or representative dockets. More specifically, the United States District Court for the District of Columbia should receive consideration because it hears so many appeals from administrative agency decisions involving the environment, while individual districts in the West may warrant analysis, as those courts resolve numerous cases implicating public lands, natural resources, and endangered species.

II. APPRECIATION OF ENVIRONMENTAL LITIGATION

We need a more refined understanding of modern environmental litigation, particularly comprehension that is differentiated rather than monolithic. Professor Appel does describe numerous types of environmental lawsuits, although *Environmental Paradigm* appears to treat these actions as if they were comparatively similar.

There is much difference between an appeal to the United States Court of Appeals for the District of Columbia Circuit of a regulation promulgated by the Environmental Protection Agency in an Administrative Procedure Act notice and comment rulemaking proceeding that involves the Clean Air Act and an appeal to a federal district court of a Forest Service decision authorizing a timber sale on a specific national forest. However, these are simply examples of the kinds of lawsuits that can arise at the polar extremes of environmental litigation, which ranges across a very broad spectrum.

Factors which may affect the litigation include the substantive basis of the case, the party structure, the underlying substantive and procedural decisions that are at issue, and the interests implicated by the litigation. More specifically, is the litigation premised on the Constitution or a statute? If it is based on legislation, what is the statutory purpose: pollution control, environmental or species protection, or public lands preservation? Who are the parties and the intervention applicants; what is the nature of the interest which they seek to vindicate, and how does that interest implicate relevant statutes? Is plaintiff, defendant, or the intervention applicant a governmental agency, a private individual or entity, or a "public interest litigant?" Does the appeal arise from an agency rulemaking, adjudicatory proceeding, or related governmental action or inaction or involve private activity? In short, we need

an understanding of environmental litigation that is at once broader and more refined, and an appreciation that this form of modern lawsuit is not monolithic.⁹

In most situations, the touchstone of analysis will be the purpose of the environmental statute which underlies the litigation, and how this purpose relates to the interest requirement for intervention. The statutory purpose is the modern-day equivalent of the claim to private property which most easily satisfied the original Federal Rule 24. Congress generally intends environmental legislation to protect the environment from injury or to preserve certain environmental values, although some statutes, especially those prescribing pollution control, recognize that the interest in protecting the environment is to be balanced with the usually economic interests of the individuals and entities that the environmental regulation or protection directly affects. Ascertaining these statutory purposes requires careful scrutiny of the language and the applicable legislative history to discern congressional intent.

III. A WORD ABOUT PRESCRIPTIONS

Assuming for the purpose of argument that *Environmental Paradigm* affords an accurate descriptive account of intervention in modern environmental cases, the article's prescriptions warrant evaluation. Even if Professor Appel correctly surmises that appellate courts review district court intervention decisionmaking too rigorously, trial judges grant intervention too liberally, and interests permitted to intervene impose substantial burdens on parties and courts, particularly vis-à-vis their contributions,¹⁰ his proposals deserve analysis.

Environmental Paradigm recommends that appellate courts, which now employ de novo review of trial court intervention decisionmaking, substitute abuse of discretion review.¹¹ The article invokes Judge Henry Friendly's admonition in *Hooker Chemicals* that appeals court judges defer to district judges who have the "feel of the case."¹² Questioning the preeminent appellate judge of a generation is always treacherous.¹³ However, this view

9. For general examples of the specific type of analysis that I am suggesting, see Tobias, *supra* note 6, at 279-83; Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C. L. REV. 745, 754-57 (1987).

10. See Appel, *supra* note 1, at text accompanying nn.449-60.

11. See *id.* at nn.438-41 and accompanying text.

12. *United States v. Hooker Chems. & Plastics Corp.*, 749 F. 2d 968, 991 (2d Cir. 1984); see also Appel, *supra* note 1, at n.443 and accompanying text.

13. See Paul Freund, *In Memoriam: Henry J. Friendly*, 99 HARV. L. REV. 1709, 1720 (1986); see

vests substantial authority in a single decisionmaker, who may already be overburdened by an enormous caseload and who may be considering the petition of an applicant that is politically unpopular, has scarce resources, or apparently promises to complicate or prolong already complex or lengthy litigation.¹⁴ The abuse of discretion standard, thus, may simply place too much trust in the discretion of one individual decisionmaker.

Professor Appel also suggests that district courts apply a non-trans-substantive approach to Rule 24.¹⁵ The history of the provision's 1966 amendment and of subsequent passage of major environmental statutes can support this position,¹⁶ while Judge Friendly trenchantly stated that the Rule's intervention requirements must be read "in the context of the particular statutory scheme that is the basis for the litigation."¹⁷ For example, judges could consider the congressional purposes in adopting the substantive legislation that underlies the litigation when resolving intervention requests. If courts follow this approach, they may well grant intervention more liberally than in the past because many intervention applicants arguably seek participation to vindicate the statutory purposes, which generally relate to protection of the environment.

Environmental Paradigm also proposes that district judges employ amicus curiae involvement as a substitute for intervention of right.¹⁸ This approach seems inadvisable for several reasons. First, the successful intervention applicant enjoys party status, which bestows rights, such as the ability to participate in discovery and to cross-examine witnesses, which an amicus does not.¹⁹ Amici have traditionally contributed input to the appellate process on legal issues, rather than factual ones.²⁰ Some modern environmental litigation involves only legal questions, but more of these cases implicate factual disputes and a number are fact-intensive. The

also Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747 (1982).

14. For discussion of these ideas in a related context, see Carl Tobias, *Rule 11 and Civil Right Litigation*, 37 BUFF. L. REV. 485, 495-98 (1988-89).

15. See Appel, *supra* note 1, at n.448 and accompanying text; see also Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975).

16. The 1966 revision's drafting was essentially concluded in 1962, before the passage of every major modern environmental statute. The drafters evinced contemporaneous appreciation of civil rights litigation, however, and intimated that they wrote the revision with this form of public law litigation in mind while apparently contemplating that judges would flexibly and pragmatically apply the new provision to facilitate these cases. See Tobias, *supra* note 8, at 430-431.

17. *Hooker Chemicals*, 749 F.2d at 983.

18. See Appel, *supra* note 1, at nn.449-60 and accompanying text.

19. Compare FED. R. CIV. P. 24(a)(2) with FED. R. APP. P. 29. See generally 9A C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROC.* § 3975 (1999).

20. See WRIGHT & MILLER, *supra* note 19. But see STEPHEN L. WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* 110-11 (2d ed. 1984).

comparatively limited experience with amicus participation in trial court litigation may also mean that its use is not well understood in this context. For instance, it remains unclear how much attention, if any, district judges accord the input of amici.

IV. ENVIRONMENTAL LITIGATION AS PARADIGMATIC PUBLIC LAW LITIGATION

Despite Professor Appel's careful treatment of environmental litigation and of intervention in it and notwithstanding his article's title, *Environmental Paradigm* clings too substantially to a private law view of environmental litigation and participation in it. As the twenty-first century opens, it is simply too late in the day to consider environmental cases as bipolar disputes between two private parties or to emphasize the speed with which courts resolve cases and the litigation expenses that intervenors impose on parties.²¹ Many factors compel a more public perception of environmental litigation. Plaintiffs typically base these lawsuits on federal statutes, which are intended to protect the environment and they seek to vindicate important interests that affect the public. Moreover, the Advisory Committee, in drafting the 1966 revision of Rule 24, intended to depart from the view that private property could best satisfy the interest requirement in the provision.²² The Committee intended judges to apply the intervention device flexibly and pragmatically and evinced some cognizance of public law litigation and of intervention in it. Subsequent congressional passage of environmental statutes whose principal purpose was to protect the environment and on which environmental litigation is premised further reinforces this public law perspective on the litigation and intervention in it.

CONCLUSION

Environmental Paradigm substantially improves comprehension of public law litigation and intervention in environmental disputes. Certain aspects of Professor Appel's analysis are controversial or warrant elaboration, however. Supplementation of his valuable contribution would advance understanding of this critical form of modern public law litigation and of the valuable intervention device.

21. For helpful articulation of these ideas, see Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988).

22. I rely in the remainder of this paragraph on Tobias, *supra* note 8, at 430-31.